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In the
Supreme Court of the United States

OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS, THE HUMAN RELATIONS COMMISSION AND EARL D. JACKSON, SR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RELATIONS COMMISSION

Petitioner

VERSUS

LOUISIANA DEBATING AND LITERARY ASSOCIATION, THE STRATFORD CLUB, THE BOSTON CLUB OF NEW ORLEANS AND THE PICKWICK CLUB

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME II

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MINUTE ENTRY
McNAMARA, J.
MARCH 10, 1994

FILED
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA DEBATING AND LITERARY ASSOCIATION, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 93-658 AND CONSOLIDATED CASES
CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (4)

Before the court are two Motions for Summary Judgment filed by Plaintiffs. This action involves four consolidated cases which contain common questions of both law and facts. Three Plaintiffs, the Louisiana Debating and Literary Association ("Louisiana Club"), the Stratford Club, and the Boston Club of New Orleans ("Boston Club"), join in one of the pending Motions, and the Pickwick Club, the other Plaintiff in this matter, filed its own Motion for Summary Judgment. Defendants have filed memoranda in opposition to both Motions, which are

before the court on briefs only without oral arguments.

I. BACKGROUND

Plaintiffs are a group of private social clubs in the City of Orleans (the "City"), threatened with investigation by the City pursuant to a City Ordinance which, in part, regulates membership in clubs satisfying the Ordinance's definition of "public accommodation." The Ordinance in question, which is codified at Chapter 40C of the Code of the City of New Orleans, was enacted on December 19, 1991. Chapter 40C proscribes and criminalizes discrimination in the membership of clubs meeting the definition of "public accommodation" if such discrimination is based upon race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, physical condition or disability.

The Ordinance defines "public accommodation" to include any club which (1) has more than 75 members, (2) provides regular meal service, and (3) regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, either (i) from or on behalf of non-members for or in the direct or indirect furtherance of trade or business, or (ii) from or on behalf of any person who claims such payment as a business expense for tax purposes. Section 40C-101(2). The Ordinance expressly exempts from its definition of "public accommodation" any bona fide private club which does not meet the above-referenced definition. Section 40C-101(3)a. Furthermore, the Ordinance provides that a club is distinctively private in character and outside the reach of the Ordinance if the state or federal constitutional doctrines of privacy or

freedom of association would require that the Ordinance not be applied against a club. Section 40C-103(b)(2).

Before a club can benefit from this distinctively private club exception, however, that club must be listed as such in the registry of the Human Relations Commission ("HRC"). Before the HRC will certify a club as distinctively private, the club must complete an application form and present it to the Director of the HRC, who will then schedule a public hearing on the club's application. The applicant must publish notice of its application and the date of the hearing in the Official Journal three times, each at its own expense. At the public hearing, anyone is free to attend and support or oppose the application, and the HRC and its staff are free to interrogate the applicant's representatives without any stated limitations. Ch. 40C-103.

In addition to providing the HRC with the responsibility of conducting public hearings on applications seeking private club status, Chapter 40C also requires the HRC to investigate complaints of discrimination by members of the public and to enforce the Ordinance. The HRC has the power to compel the production of documents and the testimony of witnesses by issuing subpoenas.

On February 17, 1993, Plaintiff, the Pickwick Club, received a letter from the HRC notifying it that Clarence Hunt, a resident of San Francisco, California, had filed a complaint of discrimination against Plaintiff. The following day, on February 18, 1993, the other three Plaintiffs received a letter from the HRC notifying them that the HRC would conduct an investigation of Plaintiffs pur-

suant to a complaint filed with the HRC by the same Clarence Hunt, alleging discrimination in violation of Chapter 40C.

Fearing that application of Chapter 40C would unconstitutionally deprive both them and their members of their right to privacy and freedom of association, Plaintiffs filed the present action pursuant to 42 U.S.C. § 1983 seeking: (1) a declaration that Chapter 40C does not apply to the Plaintiffs, or alternatively, that application of Chapter 40C to Plaintiffs violates their rights under the United States Constitution; (2) the issuance of a permanent injunction prohibiting any investigation by Defendants of Plaintiffs pursuant to Chapter 40C; and (3) the issuance of a permanent injunction enjoining Defendants from applying or attempting to apply Chapter 40C to Plaintiffs. Plaintiffs also assert several pendant state law claims.[1] Arguing that

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[1] Plaintiffs' pendant state law claims are:

(1) The Ordinance contravenes a general act and the general policy of the State of Louisiana and is invalid;

(2) The Ordinance as applied to Plaintiffs exceeds the authority of Defendants and serves no legitimate public interest of the City;

(3) The Ordinance is an unauthorized local regulation of private or civil relationships in violation of Article 6, Section 9 of the Louisiana Constitution;

(4) Plaintiffs are not public accomodations within the meaning of the Ordinance;

(5) The enactment of the Ordinance exceeds the authority of the City Council of New Orleans under the City's Home Rule Charter in that the Ordinance improperly delegates to the HRC powers reserved by the Home Rule Charter exclusively to the City Council; and

there are no genuine issues of material fact and that they are entitled to judgment as a matter of law, Plaintiffs filed the present Motions for Summary Judgment.

Defendants' opposition to the pending Motions is primarly based on two grounds. First, Defendants argue that genuine issues of material fact exist, and thus, summary judgment is improper. Second, Defendants argue that Plaintiffs' constitutional claims, which are based upon their alleged status as private clubs, amount to a facial attack on Chapter 40C. To succeed in a facial challenge, Defendants correctly point out that the court must find that the Ordinance cannot be applied in a constitutional manner. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984). Defendants note that Chapter 40C can be constitutionally applied to private clubs because the Ordinance affords clubs the opportunity to raise and to prove their status as a private club at the public hearing before the HRC. If the director of the HRC determines that Plaintiffs are indeed private clubs under prevailing case law, then the Ordinance expressly exempts Plaintiffs from its reach. Along this same line, Defendants contend that Chapter 40C can be constitutionally applied to private clubs because it allows private clubs to seek admission as such into the registry and provides for a public hearing before the HRC on the issue of the applicant club's status.

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footnote 1 continued

(6) The rules promulgated under the Ordinance are inconsistent with the Ordinance itself, the application of the Ordinance to Plaintiffs' conflicts with express terms of both the Ordinance and such rules, and the Ordinance defines key terms in a manner which deviates from state and federal law.

At the outset, the court finds that Plaintiffs are challenging the Ordinance on constitutional grounds only as the Ordinance applies to them. Indeed, the prayers for relief seek a declaration that Chapter 40C does not apply to Plaintiffs, or alternatively, that application of the Ordinance to Plaintiffs violates their rights under the United States Constitution. The court has found no reference by Plaintiffs that the Ordinance cannot be constitutionally applied to anyone. Instead, Plaintiffs specifically assert in their supporting memoranda that they seek a ruling that Chapter 40C is invalid as applied to them because they, as bona fide private clubs, are entitled to First Amendment protection. *See* Memorandum of Pickwick Club at p. 3 and Memorandum of Louisiana Club, Stratford Club, and Boston Club at pp. 3, 50. Accordingly, this court will analyze Plaintiffs' constitutional claims as an "as applied" challenge to the Ordinance.

II. ANALYSIS

Each Plaintiff club brings this action for itself and on behalf of its members. At the heart of this matter is Plaintiffs' contention that they are private clubs pursuant to United States Supreme Court jurisprudence. As private clubs, Plaintiffs argue that they have a constitutionally protected right of privacy and freedom of association under the First Amendment, as applied to the states through the Fourteenth Amendment. Moreover, Plaintiffs allege that any application of Chapter 40C to them, including any investigation of them pursuant thereto, is an unconstitutional infringement on their rights of privacy and freedom of association. In order to resolve this constitutional issue, therefore, the court must make two separate inquiries.

First, whether Plaintiffs are in fact private clubs under Supreme Court jurisprudence - if not, the court need go no further. Second, whether the HRC's investigation into the complaint of discrimination against Plaintiffs constitutes unwarranted governmental intrusion into (1) an individual's choice to enter into and maintain certain intimate or private relationships,[2] or (2) the right of an individual not to have his private affairs made public by the government.[3]

1. *Whether Plaintiffs are Private Clubs:*

Concerning a state's attempt to eliminate discrimination in private organizations, the courts have consistently recognized that the First Amendment right of freedom of intimate association provides individuals with a substantial measure of sanctuary from unjustified state interference into the formation and preservation of certain kinds of highly personal relationships. *Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984). Because the Supreme Court has identified a qualitative continuum of personal relationships, this court must ascertain where each Plaintiff Club's "objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. Inquiry into Plaintiffs' locale on this continuum of personal relationships, under the private club exception, involves consideration of several factors: (1) whether the club has a longstanding history of serving a purely social, non-business purpose;

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[2] *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 544 (1987).

[3] *Whalen v. Roe,* 429 U.S. 589, 599 (1977).

(2) whether the club has a nexus of common social interest and congeniality; (3) whether the club has a selective and exclusive membership criteria; (4) whether the club secludes its activities and facilities from the public; (5) whether the club employs restrictive guest policies; (6) whether the club is conrolled by its members; (7) whether the club is small in its size and scope; and (8) whether the club is a nonprofit organization. *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988); *Board of Directories of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984); *Daniel v. Paul,* 395 U.S. 298, 301-302 (1969); and *Welsh v. Boy Scouts of America,* 993 F.2d 1267 (7th Cir. 1993), *cert. denied* 114 S.Ct. 602 (1993). Upon consideration of these eight factors, the court concludes that each Plaintiff has established that it is a private club located at the most intimate end of the qualitative continuum of personal relationships.

A. *Purely Social, Non-business Purpose and History*

In *Rotary Club,* 481 U.S. 537 (1987), the Supreme Court held that enforcement of California's anti-discrimination statute against the Rotary did not violate the club's right to freedom of association. In reaching its conclusion, the Court emphasized that the stated purpose of the Rotary was to produce an inclusive membership enabling the club to be a true cross section of the community. The Rotary was designed to aid the community and to improve international relations. *Id.* at 546. Thus, the court noted that Rotary's "inclusive fellowship for service based on diversity of interest, . . . does not suggest the kind of

private or personal relationship to which we have accorded protection under the First Amendment." *Id.* at 546-47.

In contrast to *Rotary,* each Plaintiff Club was founded in the 1800's and has a longstanding history of existing exclusively for private, social purposes. *See* Pickwick Club's Articles of Incorporation and Mayer, Geary and Combe affidavits. The By-Laws of the Pickwick Club reveal that it is a "private social, literary, cultural and recreational club designed to promote the gathering and social intercourse of friends and family members . . . ." Likewise, the charters of the Louisiana, Stratford, and Boston Club reveal that they are organized to promote "social intercourse among members" and to pursue "social purposes." *See* Mayer, Geary and Combe affidavits. Moreover, the Louisiana, Stratford, and Boston Clubs' activities are all private, consisting of noontime meals and certain parties and dances attended only by their respective members and their guests. *See* Mayer, Geary and Combe affidavits, Depositions of Combe at 50-52, Gilly at 40-41, 48-49, Hebert at 9-12, Maheu at 33-35, Mayer at 34-36, and Milling at 27. The Pickwick Club holds social dinners about once a month which are also limited to its members and their guests. *See* Depositions of Johnsen at 25 and Vilkhu at 20.

In addition to serving purely social functions, each Plaintiff Club prohibits the transaction or discussion of any business on their premises. To ensure this, Plaintiffs prohibit any member or guest from displaying, or offering, a business card or from displaying business papers on the respective Club premises at all times. *See* Mayer, Geary and Combe affidavits and Depositions of Flower at 15;

Pickwick Club's By-Laws and Articles XI § 1. The rule against conducting business is not just a rule but it is strictly adhered to by the Club's members. *See* Mayer, Geary and Combe affidavits and Depositions of Bruns at 60, Flower at 34-40, Geary at 72, 108, Janvier at 51, Mayer at 100, Milling at 42 and Monsted at 43; Depositions of Vilkhu at 29-32, Flower III at 34-40, Powell III at 65-66. After reviewing the entire record, this court finds that there is no genuine factual issue that each Plaintiff Club has a purely social, non-business purpose and history.

B. *Common Social Interest and Congeniality and Selectivity and Exclusivity in Selection of Members*

In ruling that the Jaycees, a young men's civic organization, lacked distinctive characteristics that might have afforded them constitutional protection in restricting membership to males only, the court noted "[a]part from age and sex, neither the national organization nor the local chapter employ any criteria for judging applicants for membership . . . ." In fact, one "local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex." *Roberts v. United States Jaycees,* 468 U.S. 609, 621 (1984). Likewise, the court found that Rotary did not possess the kind of private or personal relationship to which it has accorded First Amendment protection, in part, because each club was instructed to accept all qualified persons, to not limit the number of members, and to establish a membership growth pattern. *Rotary Club,* 481 U.S. 537, 547 (1987).

Unlike the Jaycees and Rotary, Plaintiffs' members

share similar social interests and backgrounds, and oftentimes, their relationships pre-date membership in the Club through family, church, or other social groups. *See* Mayer, Geary and Combe affidavits and Depositions of Geary at 20, Gilly at 74, and Mayer at 30; and Johnsen affidavit at 3. The Pickwick Club selects its members based upon familial relationships, social acquaintances, congeniality, and compatibility. *See* Johnsen affidavit and Depositions of Kock III at 38 and Flower III at 33-47. Similarly, the Louisiana, Stratford, and Boston Clubs select their members based upon character, honesty, integrity, compatibility, and most importantly, congeniality among the members. *See* Mayer, Geary and Combe affidavits and Deposition of Gilly at 58. Therefore, there is a close nexus between the stated purpose of Plaintiff Clubs and their criteria for membership.

In addition to this close nexus between the Clubs' purposes and membership criteria, each Club employs an extremely restrictive membership policy. Indeed, new members are proposed only by the existing members and neither Club allows an individual to "apply" for membership. *See* Pickwick Club's By-Laws, Art. 1 § 2; Mayer, Geary and Combe affidavits. After a proposal for membership has been made, the respective Club begins a fairly rigorous screening process to ascertain whether the prospective member meets the selective criteria of the respective Club. If the proposed member passes the screening process, the general membership is then given the opportunity to approve or disapprove of the proposed member. The general membership may reject admission for any proposed member by registering the requisite number of objections as required under the respective Clubs' By-Laws; for

the Pickwick Club, three objections suffice; five objections suffice for the Boston Club; and for the Louisiana and Stratford Club, three objections prevent admission. *See* Pickwick Club's By-Laws, Art. I § 2 and Mayer, Geary and Combe affidavits. Many proposed members are not elected or approved for membership. Thus, Plaintiff Clubs employ a highly selective membership policy.

C. *Seclusion of Activities and Facilities from the Public*

The Louisiana, Stratford, and Boston Clubs have only one facility each, and they are maintained for the exclusive use of members and, in limited instances, their guests. These facilities are never open to the public and there are no outward signs identifying their locations. The Clubs strictly prohibit non-members from using their facilities. *See* Mayer, Geary and Combe affidavits. The rules, current membership lists and activities of the Louisiana, Stratford, and Boston Clubs are completely private and outside the public's view. The Boston and Stratford Clubs have written rules prohibiting public statements or photographs relating to the Clubs' appearance, By-Laws, social functions or members. The Louisiana Club requires that each of its members pledge that its rules and activities will remain confidential. *See* Mayer, Geary and Combe affidavits.

Similarly, the Pickwick Club has only one facility and it owns the building in which its meeting rooms are located. There are no signs identifying its location. The Club's door is unmarked and locked twenty-four hours a day. Members enter the Club through use of a numbered

key pad whose entry code is changed regularly. *See* Johnsen's affidavit. The Pickwick Club is not open to the public and it does not lease its facilities to non-members under any circumstances. In short, the Pickwick Club's facilities are used only by its members and their guests. While the Rotary Clubs sought to keep their "windows and doors open to the whole world," *Rotary Club*, 481 U.S. at 547, each Plaintiff Club "bars its doors and has virtually no windows." *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 295 (Cal. App. 1st Dist. 1991). Thus, this court finds that Plaintiff Clubs' activities and facilities are secluded from the public.

D. *Restrictive Guest Policies*

The Louisiana Club outright prohibits its members from bringing or inviting any male guests, residents or non-residents, to the Club at any time and under any circumstance. On very rare, specially designated occasions, its members may invite female guests who are, on most instances, their wives. *See* Geary affidavit and Deposition of Gilly at 65. The Boston and Stratford Clubs prohibit male residents of the City from being guests. On extraordinary occasions, however, they do allow women and children residents to be guests while accompanied by a member. *See* Mayer and Combe affidavits and Depositions of Combe at 52 and Mayer at 36. Non-resident males may be guests under conditions strictly limiting the time, frequency, and occasion of the visit. No guests are permitted to bring other guests and no guests are allowed to attend any Club meeting. All non-resident guests must be a personal friend or close relative of the introducing member, who must believe that the guest will be welcomed by the other

members. *See* Mayer and Combe affidavits and Deposition of Gilly at 29-32.

The Pickwick Club allows its members to bring non-resident males as guests to dine during the noonday meals provided such guests are personal friends or close relatives of the members who have some basis for a social acquaintance with the other members. *See* Johnsen's affidavit and By-Laws, Art. XI § 1. Ladies are allowed as guests on invitation of the Board of Governors or on invitation of a member on such occasion and at such times as the Board of Governors determines. *See* By-Laws, Art. XI § 2. Only on rare occasion may resident males be admitted as guests and only then by invitation of the Board of Governors. *See* By-Laws, Art. XI § 3. Clearly, Plaintiff Clubs have definite rules on permitting guests and all point to a highly restrictive guest policy.

E. *Membership Control*

The Louisiana, Stratford and Boston Clubs are comprised of governing boards, committees, and memberships at large who meet on a regular basis in order to manage and govern the Clubs' affairs. Although the respective governing boards are responsible for the overall management duties, the members-at-large elect these boards, and therefore, the members directly control the management and operation of these Clubs. *See* Mayer, Geary and Combe affidavits and Deposition of Gilly at 56-60. Similarly, as demonstrated through its Articles of Incorporation and its By-Laws, the Pickwick Club's policies are determined only by its members and by its elected Board of Governors. *See* Articles of Incorporation, Art. V § 2; By-Lays, Art. VI §§

1, 2; and Deposition of Johnsen at 10. Based upon the uncontradicted evidence contained in the record, this court finds that Plaintiff Clubs are managed and controlled solely by their respective members.

F. *Small in Size and Scope and Not-for-Profit*

In denying the Jaycees First Amendment protection, the Supreme Court noted that the Jaycees had 295,000 national members in 7,400 local chapters. The Jaycees' policy making authority was vested in a national board consisting of delegates from local chapters. *Roberts,* 468 U.S. at 613. Likewise, in denying First Amendment protection to the Rotary Club, the Court noted that Rotary International had about 900,000 members, including 19,788 local clubs in 157 countries. *Rotary Club,* 481 U.S. at 539-40, 46.

In stark contrast, the Pickwick Club limits its regular membership to 550 persons. *See* Pickwick Club's By-Laws, Art. 1 & 11(a). The Pickwick Club has no connection with a larger institution or club. *See* Deposition of Johnsen at 50. The Louisiana Club caps the number of its resident members at 325, the Stratford Club at 350, and the Boston Club at 600. The Boston and Stratford Clubs also allow a limited number of non-resident and life members. The Louisiana Club extends non-resident memberships only to resident members who subsequently move away. *See* Mayer, Geary and Combe affidavits and Depositions of Bruns at 27, Deal at 30, 69, Gilly at 43, 67, Mayer at 31-32, and Maheu at 37-38. Like the Pickwick Club, neither the Louisiana, Stratford, nor the Boston Club is a member of any national association and none are part of any umbrella organization.

In considering the size of Plaintiff Clubs pursuant to the private club exception, this court is aware that the Seventh Circuit recently held that the Boy Scouts was a private club even though it had 5,000,000 members. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir. 1993), *cert. denied* 114 S.Ct. 602 (1993). The *Welsh* court reasoned that, despite its millions of members, the Boy Scouts met the Supreme Court's requirements that there be a "plan or purpose of exclusiveness." *Id.* at 1276 (citation omitted). As demonstrated above, Plaintiff Clubs employ a highly selective membership criteria which ensures exclusiveness. Furthermore, this court finds that a club with 600 or fewer resident members, in such a large and diverse area as metropolitan New Orleans, is sufficiently intimate to warrant First Amendment protection.

An organization's status as for profit would tend to indicate it has a commercial rather than social purpose, which would weigh against affording a club with First Amendment protection. *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969). Such is not the case with Plaintiff Clubs, however, as each is a not-for-profit Louisiana Corporation. *See* Pickwick Club's Articles of Incorporation, Art. I §§ 1, 2, and 3, and Mayer, Geary and Combe affidavits. After reviewing the record and finding that every factor used in determining private club status weighs in favor of Plaintiff Clubs, this court concludes that there is no genuine factual issue that each Plaintiff Club is a "private club" entitled to stringent First Amendment protection.

Defendants argue that summary judgment is improper because genuine issues of material fact exist concerning whether or not Plaintiffs are "private clubs." The

court finds no evidence in the record to support Defendants' argument or to refute the evidence presented by Plaintiffs.[4] Defendants first question whether Plaintiffs have shown themselves to have a purely social, non-business purpose and history because several officers of Whitney National Bank testified that, in times past, the bank, as a perk, reimbursed its officers for their club membership dues. This court has found no cases suggesting that reimbursement, as a perk, for dues in a "private club" has any bearing on that club's status. *See* Deposition of Milling at 20. Moreover, each bank officer testified that he had never conducted or discussed business at any of the Clubs, nor had he taken guests there for business purposes. *See* Depositions of Milling at 42-43, Mayer at 100, Bruns at 60, Janvier at 51 and Monsted at 43. Thus, there is no genuine issue concerning the purely social, non-business purpose of Plaintiff Clubs.

Defendants also argue that there is a genuine issue concerning the size of Plaintiffs because the exact membership numbers are not known. As this court has discussed above, more important than the number of members is how selective the club is in accepting its members. *Welsh*, 993

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[4] The record reveals that the parties had more than six months to conduct discovery. Three of the Complaints herein were filed on February 25, 1993, and the fourth Complaint was filed on March 2, 1993. By way of mutual agreement, the parties had until September 3, 1993 to finish all discovery. *See* Document No. 36. On August 23, 1993, Defendants sought a three week extension to conduct discovery because the City was under a four day work week and because there was not enough time to file a Motion to Compel before September 3, 1994. The court denied the Motion to Continue Discovery Deadlines finding that the stated reasons did not warrant a continuance. Subsequently, Defendants did timely file a Motion to Compel which was granted in part. *See* Documents No. 85 and 99.

F.2d at 1276. Contrary to Defendants' assertion, the record reveals that the Louisiana Club has 317 resident members and a total of 423. *See* Geary affidavit and Deposition of Maheu at 37. The Boston Club has 600 resident members and a limit of 400 non-resident members. *See* Deposition of Deal at 30. The Stratford Club has 333 resident members and a limited number of non-resident members. *See* Combe affidavit. Lastly, the Pickwick Club limits its membership to 550 persons. Thus, Defendants have failed to raise a genuine issue of material fact concerning the status of any Plaintiff Club, and this court finds that each Plaintiff is a "private club."

2. *Whether the City can Validly Apply Chapter 40-C to Plaintiffs:*

Unquestionably, the First Amendment right to freedom of intimate association shields individuals from unjustified state interference into the formation and preservation of certain kinds of highly personal relationships. *Roberts,* 468 U.S. at 618. Because the Supreme Court has identified a qualitative continuum of personal relationships, there necessarily exists a broad range of human relationships that may be permitted to make greater or lessor claims to First Amendment protection from particular state infringements. "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics [determined by applying the factors discussed above] locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 620. Because Plaintiff Clubs easily met every factor in determining private club status and because they have very selective membership policies designed to ensure com-

radery and close personal acquaintances, this court finds that Plaintiff Clubs are entitled to the fullest protection of the first Amendment's right to privacy and freedom of intimate association.

The First Amendment, in providing for a constitutionally protected zone of privacy, recognizes at least two kinds of important interests. One is an individual's choice to enter into and maintain certain intimate human relationships without undue intrusion by the State because of the role such relationships play in safeguarding the individual freedom that is the cornerstone of our constitutioinal scheme. *Roberts*, 468 U.S. at 617-618. This freedom of association is a fundamental right. *Id.* Another interest protected by the First Amendment is the right of an individual not to have his private affairs made public by the government. *Whalen v. Roe,* 429 U.S. 589, 599 n. 24. The question this court must now address is whether the HRC's proposed investigation into the complaints of discrimination by Plaintiff Clubs will unduly infringe on their rights to freedom of association and their rights not to have their private affairs made public by the government. Finding that this question must be answered in the affirmative, the court declares that Chapter 40-C cannot be constitutionally applied to Plaintiffs.

Defendants argue that Chapter 40-C can be constitutionally applied to Plaintiffs because the City has a compelling interest in eradicating invidious discrimination against its citizens and because Plaintiffs are free to assert their "private club" status during the administrative hearings before the HRC. The court agrees that the City has a compelling interest in preventing discrimination. The court finds, however, that the HRC's threatened investigation of

Plaintiffs, including public hearings coupled with the inevitable attendant publicity, would unduly burden Plaintiffs' First Amendment rights.

In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), the court held that First Amendment rights of privacy and freedom of association prevented the state from obtaining a membership list of the N.A.A.C.P. during the course of the state's investigation, In reaching this conclusion, the court emphasized:

> This court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . .
>
> We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association . . . .
>
> We hold that the immunity from state scrutiny of membership lists which the association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment . . . .

Id. at 462, 466. As the *N.A.A.C.P.* case demonstrates, governmental investigation into purely private affairs oftentimes has a chilling affect on First Amendment rights that is as devastating, if not more so, than the final state

action taken after the investigation.

Moreover, Plaintiff Clubs have established that there is a reasonable probability that the HRC's investigation into the complaints of discrimination would publicly reveal its membership lists and other intimate aspects of Plaintiff Clubs that would have a chilling affect on their members' First Amendment rights. Chapter 40C created the HRC to investigate complaints of discrimination by members of the public and to enforce the Ordinance by imposing certain penalties. The HRC's investigative powers include the right to compel production of documents and testimony of witnesess at a public hearing. Judging from Defendants' First Request for Production of Documents, the breadth of the testimony and documents likely to be sought during the public hearings by the HRC is far-reaching and certainly contains private and sensitive Club matters deserving of constitutional protection.

For example, in this lawsuit, Defendants have sought production of the current membership lists of Plaintiffs and production of any rosters of officers and committee members including membership committee members and life members. Defendants also requested complete copies of all tax returns from 1988 through 1992 filed by each member of Plaintiff Clubs. Furthermore, Defendants sought to obtain a list and copy of all documents announcing and/or describing all events held at the Clubs after 1988. Thus, it is evident to this court that application of Chapter 40C to these Plaintiff Clubs expose them to HRC orders that they go back in time, at least until 1988, and publicly reveal in detail the names of every member and every officer, the internal rules and policies of the Clubs,

copies of each member's tax returns, and complete descriptions of every Club activity. Administrative application of Chapter 40C to clubs that have clearly established their status as "private clubs" located at the most intimate and of the continuum of personal relationships violates their First Amendment rights to privacy and freedom of intimate association.

The court notes that the Clubs' members have similar social interests and backgrounds and many have longtanding friendships among themselves. Oftentimes, their relationships were originally formed through family, church, or school functions. Moreover, criteria for membership includes character, honesty, integrity, congeniality and compatibility with existing members. Because of these intimate, family-like relationships among members, it is likely that members carry on activities at the Clubs in much the same way that they do at their homes. If the government can force Plaintiff members to publicly reveal these types of activities, then the First Amendment would have no utility. Clearly, the First Amendment provides individuals with definite and important rights, and exposing these private club members to revelation of these types of activities, along with members' tax returns and membership lists, violate the rights of these individuals not to have their private affairs made public by the government. *Whalen*, 429 U.S. at 599 n. 24.

Defendants note that Chapter 40C-103 sets forth a procedure by which a club may apply for and obtain designation as a "distinctively private" club. Upon receipt of a club's application to be placed in the registry of private clubs, the HRC assigns a date and time for public hearings

to be held. This hearing will again subject Plaintiff Clubs to the same inquiry of private and sensitive information as discussed above. The applicant must publish notice of the application and hearing three times in the Official Journal, all at the applicant's expense. Any interested person may appear at the public hearing to oppose the application. Chapter 40C-103(d). If the HRC designates a club as "distinctively private," such designation is valid for only three years. Chapter 40C-103(a). Even during this three-year period, however, the HRC can initiate proceedings for the removal of any club from the registry. The HRC can initiate these removal proceedings *sua sponte* or upon receipt of a written complaint. The HRC then publishes notice of the removal hearing and any interested person can attend the hearing and support the complaint. Chapter 40C-103(g). As applied to Plaintiff Clubs, Chapter 40C-103 envisions unwarranted future and repeated regulations of clubs deserving of the highest First Amendment protection.

The members of these private clubs have the right to be free from Government prying into their private affairs. To expose the individual members of these clubs to the hearing contemplated in Section 40C-53 is to subordinate their rights to governmental curiosity about their private affairs. The First Amendment does not permit such governmental intrusion. There is no question that ending public discrimination is a laudable goal and that invidious discrimination in any form is reprehensible. However,

> [w]hen the state intrudes into the membership policies of private clubs, it abridges the rights of club members to socialize with people of their own choosing.... Unless the state acts to serve a com-

> pelling interest unrelated to furthering its vision of socially acceptable behavior, it is simply pressing club members into service to send society a message of inclusion and equality.... [T]he first amendment protects associational choices, as it protects expression, from governmental efforts to establish an official view of a just society....
>
> Protecting the right of some social clubs to discriminate in selecting their members is the constitutional embodiment of the common sense that underlies the traditional respect accorded distinctively private groups. Private discrimination should be permitted when the value of providing equal access is outweighed by the damage to associational freedom: as to certain private social groups, forcing equal access "costs much in liberty and returns little in equity."

Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations,* 104 Harv. L.Rev. 1835, at 1850 and 1856 (1991).

Moreover, Plaintiff Clubs have clearly established in this forum their right to First Amendment protection by demonstrating that they are located at the most intimate end of the continuum of personal relationships. Because Defendants' application of Chapter 40C to Plaintiffs would unduly interfere with their right to enter into and maintain certain intimate or private relationships and their right not to have their private affairs made public by the government, this court finds that Chapter 40C is unconstitutional as applied to these Plaintiff Clubs. As our Supreme Court has noted:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.

See Gilmore v. City of Montgomery, 417 U.S. 556 (1974) *quoting Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179-80 (1972) (Douglas, J. dissenting).

III. PENDANT STATE LAW CLAIMS

In addition to challenging the Ordinance on constitutional grounds, Plaintiffs also assert several pendant state law claims.[5] After reviewing the memoranda of counsel and the pendant state law claims, the court notes that only one such pendant claim was briefed by the parties and it, like several of the pendant claims, involves a facial attack on the Ordinance. For example, Plaintiffs argue that the Ordinance in question contravenes a general act and the general policy of the State of Louisiana and is therefore invalid. To support this argument, Plaintiffs note that La. R.S. 51:2231(A) created the Louisiana Commission on Human Rights and permitted local governments to create their own local human rights commissions with certain restrictions. One such restriction is that the local commissions must carry out only the policies contained in the enabling statute and the Civil Rights Act of 1964. La. R.S. 51:2237(1). Plaintiffs argue that one such policy is the

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[5] For a description of the pendant state law claims, *see* footnote 1 *supra,* and accompanying text.

State's definition of what constitutes a "public accommodation", as opposed to a bona fide private club which is not subject to the proscription against discrimination. As shown below, the state's policy as reflected in its definition of "public accommodation" is significantly different from and is in conflict with the definition contained in the City Ordinance in question.

Louisiana has defined "discriminatory practice" as an act of differentiation in the treatment of a person because of race, creed, color, religion, sex, age or natural origin. La. R.S. 51:2232(3). Furthermore, the state has declared that a "Place of public accommodation" means:

> any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds. *However, a bona fide private club is not a place of public accommodation, resort, or amusement if its policies are determined solely by its members and its services are available only to its members and their bona fide guests.*

La. R.S. 51:2232(10) (emphasis added). Thus, Plaintiffs argue that the Ordinance is invalid because its stringent private club exception conflicts with the stated policy of the State, which is to exclude from coverage any private club so long as its policies are determined solely by its members and its facilities are available only to its members and their guests.

While the court believes that this "supersession" argument may well have merit, the court declines to decide this or any other pendant claim because the court has already found that the Ordinance cannot be constitutionally applied to these Plaintiff Clubs. Moreover, the court thinks that it would be imprudent to address any pendant state law claim because the parties only briefed one such claim and because the court believes that it should first decide an "as applied"' challenge, and only if that challenge fails should the court decide a much broader facial challenge. *Moore v. City of Kilgore, Texas*, 877 F.2d 364, 390 (5th Cir. 1989). As Plaintiffs were successful in their "as applied" constitutional challenge to the Ordinance, the court will not address the pendant state law claims, which are mostly facial challenges to the Ordinance.

IV. PERMANENT INJUNCTIONS

Plaintiffs seek, in addition to a declaration that Chapter 40C cannot be constitutionally applied to them, a permanent injunction (1) prohibiting Defendants from investigating any complaint of discrimination against any Plaintiff pursuant to Chapter 40C and (2) prohibiting Defendants from applying or attempting to apply Chapter 40C in any way to Plaintiffs. Defendants advance three main reasons why Plaintiffs are not entitled to permanent injunctive relief from the Ordinance. First, Defendants argue that genuine issues of material fact remain, but for the reasons stated above in Part II, this court finds this argument unpersuasive. Second, Defendants argue that a permanent injunction should not issue because Plaintiffs are bringing a facial challenge to the Ordinance and have not proven that the Ordinance could never be applied in a

constitutional manner. Likewise, the court has already rejected this argument and found that Plaintiffs are challenging this Ordinance on constitutional grounds only as it applies to them. Lastly, Defendants suggest that "any permanent injunction order would not be meaningful since Plaintiffs' corporate organizations, questionable overall membership sizes, and the location and layout of their facilities are capable of undergoing changes that could render them subject to some future application of Chapter 40C." *See* Memorandum in Opposition to Motion for Summary Judgment of the Boston, Louisiana and Stratford clubs at pp. 3-4. While this court agrees that it is conceivable that Plaintiff Clubs could undergo organizational changes that would cause them to come within the lawful reach of Chapter 40C, the court does not find that this is sufficient to prevent the issuance of a permanent injunction because a permanent injunction is not impervious to change.

Indeed, the prospective features of a permanent injunction are subject to vacation or modification if warranted by equitable principles in light of the change in circumstances. This principle is codified in Rule 60(b)(5) which provides for relief from a final judgment if "it is no longer equitable that the judgment should have prospective application."[6]

VI. CONCLUSION

Each Plaintiff Club has clearly demonstrated that it is a private club located at the most intimate end of the

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[6] For a discussion on the duration and modification of final injunctions, *see* 7 Moore's Federal Practice § 65.08.

qualitative continuum of personal relationships. As such, Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government. Moreover, Plaintiffs have established a substantial likelihood that Defendants' application of Chapter 40C to Plaintiffs would expose them to public revelation of their membership lists, their members' tax returns, and complete descriptions of all club activities, which would ultimately have a chilling effect on their members' First Amendment rights. After reviewing the entire record, including the arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way because Defendants' application of the Ordinance to Plaintiffs, including public hearings where private and sensitive information will be sought, coupled with the inevitable attendant publicity, would unduly burden Plaintiffs' First Amendment rights. Accordingly,

IT IS ORDERED that the Motions for Summary Judgment filed by Plaintiffs, the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club, be and are herby GRANTED, DECLARING that application of Chapter 40C of the Code of the City of New Orleans to Plaintiffs violates their rights under the United States Constitution.

IT IS FURTHER ORDERED that Defendants, their officers, officials, agents, employees, and successors be and are herby PERMANENTLY ENJOINED from in-

vestigating any complaint of discrimination against the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club pursuant to Chapter 40C of the Code of the City of New Orleans, and from applying or attempting to apply Chapter 40C of the Code of the City of New Orleans in anyway to the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club.

IT IS FURTHER ORDERED that any of the parties hereto may apply for other or further action or relief, and this court hereby RETAINS JURISDICTION of this matter for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy herein.

* * * * * *

APPENDIX ITEM 3

Pgs. 562.107 - 562-140

CHAPTER 40C

NEW ORLEANS HUMAN RELATIONS COMMISSION.[1]

ARTICLE I. COMMISSION;CREATION AND STRUCTURE.

ARTICLE II. CITY POLICY AND PROCEDURES AGAINST DISCRIMINATION.

ARTICLE III. DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND CLUBS.

ARTICLE IV. DISCRIMINATION IN PUBLIC ACCOMMODATIONS, EMPLOYMENT, AND REAL ESTATE AND HOUSING.

ARTICLE I. COMMISSION;CREATION AND STRUCTURE

Section 40C-1. Authorization.

(a) It is the intent of this article to authorize creation by the Mayor of a new bureau, to be known as the Human Relations Commission, which shall be authorized to exist

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[1] Section 1 of M.C.S., Ord. No. 14,984, adopted Dec. 19, 1991, called for the addition of a Chapter 40A. Inasmuch as provisions already existed in this Code as Ch. 40A, Municipal Service Charge, new provisions adopted by Ord. No. 14, 984 have been included herein as Ch. 40C at the editor's discretion.

and act for the city, as provided in this article, with the advice of an Advisory Committee on Human Relations constituted as provided herein. It is the intent of this article to exercise the city's rights under Article VI, Section 6 of the Constitution; and the Council declares that said bureau, acting with the advice of said committee, shall constitute the city's human rights commission under state law. The term "commission," as used in this article, refers to said bureau acting with the advice of said committee; and the term "committee" refers to said committee acting as the designated advisor to said bureau. The Council finds that the use of a bureau within an existing administration unit, advised by a citizens' advisory committee, to serve as a city human rights commission will achieve the goals of independence of judgment and participation of citizens representing diverse interest and community groups while at the same time observing the Home Rule Charter policy against the proliferation of administratively discrete agencies.

(b) Subject to the limitation set forth in Subsection (c), the Mayor is hereby authorized to create, within one of the offices, departments or boards created or recognized by the Home Rule Charter, a bureau to be known as the New Orleans Human Relations Commission.

(c) The authorization granted in Subsection (b) shall be effective only during the period or periods of existence of an advisory committee on human relations appointed pursuant to Section 40C-2.

(d) The New Orleans Human Relations Commission shall be headed by a fulltime executive director, and may

employ additional staff in the manner provided by applicable law. Except as may otherwise be provided in applicable law, the Executive Director shall be appointed only after consultation with the Advisory Committee on Human Relations. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-2. Advisory committee on human relations.

(a) Pursuant to the provisions of Section 4-104 of the Home Rule Charter, the Mayor, or with the consent of the Mayor, the head of any department or any board to which the New Orleans Human Relations Commission shall have been assigned, may appoint an advisory committee to be known as the Advisory Committee on Human Relations. In order for its existence to be sufficient to give effect to the authorization granted by Section 40C-1(a), the Advisory Committee on Human Relations must be organized in accordance with Subsection (b) of this section.

(b) The Advisory Committee shall be composed of eighteen (18) members, to be appointed as follows: Seven (7) members each appointed as directed by a different member of the City Council, two (2) members appointed at the sole discretion of the Mayor, and nine (9) members appointed from a list of eighteen (18) submitted by a nominating committee composed of the Presidents of Xavier University, Dillard University, Tulane University, Loyola University, Delgado Community College, and Our Lady of the Holy Cross College, and the Chancellors of the University of New Orleans and Southern University in New Orleans.

(c) The nominating committee referred to in Subsection (b) shall be convened by the Mayor on the earliest practical date and shall conduct its own affairs as a citizens' advisory committee supported by the staff of the Office of the Mayor. Before making its nominations, the nominating committee shall solicit the recommendations of civic, professional, social, advocacy, trade, labor, civil rights, and other organizations, including but not necessarily limited to, the Chamber/New Orleans and the River Region, the Roman Catholic Archdiocese of New Orleans, the Black Economic Development Council, the local Anti-Defamation League of B'nai, the Interdenominational Ministerial Alliance, the local American Federation of Labor/Congress of Industrial Organizations, and the local Federation of Churches, and shall receive and consider the timely recommendations of any other persons who choose to submit recommendations.

(d) The appointment of a member of the Advisory Committee shall not become effective until it has been confirmed by the City Council. Members of the Committee shall serve a term of one (1) year and shall serve without compensation.

(e) A simple majority of the members of the Advisory Committee shall institute a quorum for the purposes of doing business and of formal compliance with the Open Meetings Law, unless otherwise provided by state Law. A majority vote shall be required for Advisory Committee action. The Executive Director of the Human Relations Commission shall have a voice, but not vote, in meetings of the Advisory Committee.

(f) The Mayor, the Council and the nominating committee shall exercise their best efforts to ensure that the members of the advisory committee are appointed and confirmed by the earliest possible date. Within one (1) month of its appointment, the Committee shall meet, at the call of the Mayor, and shall designate one of its members as Chairperson and one as Vice-Chairperson. The Vice-Chairperson shall act as Chairperson in the absence or disability of the Chairperson or in the event of a vacancy in that office. Any vacancy in the Committee shall not affect its powers and shall be filled in the same manner and subject to the same limitations as to the particular appointing authority that governed the original appointment.

(g) Any member may be removed by the Committee with the concurrence of the Mayor and a majority of the City Council for unexcused failure to attend meetings or neglect of duties or for any cause sufficient to warrant removal of a city board member. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-3. Duties of the commission.

The Commission, with the advice of, and in close cooperation with the Advisory Committee shall:

(1) Study and (in such manner and subject to such screening procedures as may be provided in its rules) collect information concerning written complaints, signed by one (1) or more complainants, that citizens of the City of New Orleans are being or have been deprived of rights guaranteed to them by the United States or Louisiana Constitution or the laws

of the State of Louisiana or the City of New Orleans, on account of color, race, creed, religion, culture, ancestry or national origin, sex, sexual orientation, age, physical condition or disability.

(2) Study and collect information concerning legal developments constituting discrimination or denial of equal protection of the laws under the United States or Louisiana Constitution because of color, race, creed, religion, culture, ancestry, or national origin, sex, sexual orientation, age, physical condition or disability, or the inadequate or partial administration of justice.

(3) Appraise the laws and policies of the Federal Government, the State of Louisiana, and the City of New Orleans, with respect to discrimination or denials of equal protection of the laws under the United States or Louisiana Constitution because of color, race, creed, religion, culture, ancestry or national origin, sex, sexual orientation, age, physical condition or disability, or the inadequate or partial administration of justice.

(4) Collect and report information and establish forums and other means for dialogue concerning the social and economic progress and development of all citizens of the City of New Orleans.

(5) Foster mutual understanding and respect among all economic, social, religious, cultural and ethnic groups in the city.

(6) Assist in maintaining the integrity of the electoral process with respect to voting rights.

(7) Cooperate with Federal, State, and City agencies in their efforts to curb discriminatory practices.

(8) Seek grants and donations on behalf of the city from foundations and others for the purpose of carrying out its functions, subject to the approval of the Council and the Mayor. The acceptance of such grants and donations by the city shall be subject to the provisions of Section 5-402 of the City Charter.

(9) Report to the City Council and the Mayor on an annual basis concerning each of its duties. (M.C.S., Ord. No. 14,910, § 1, 1-26-91; Ord. No. M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-4. Reserved.

Section 40C-5. Action by commission.

(a) The Human Relations Commission shall act by and through its Executive Director. In all matters, however, the Executive Director shall act strictly in conformity with the recommendations of the Advisory Committee on Human Relations.

(b) The Human Relations Commission may act contrary to the recommendations of the Advisory Commission on Human Relations only if:

(1) The City Attorney has rendered a written opinion that strict conformity with said recommendations

would be unlawful, and the Mayor has certified his acceptance of said opinion in a writing directed to the members of the Council; or

(2) The Mayor has in writing directed to the Commission and distributed to the members of the Council, suspended the obligation to act in such conformity until the adjournment of the next regular Council meeting; or

(3) The Council by two-thirds (⅔) vote has expressly overruled said recommendations of the Advisory Committee. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-6. Miscellaneous provisions.

(a) All city agencies and departments shall cooperate fully with the Commission and Advisory Committee to the end that they may effectively carry out their functions and duties.

(b) The Advisory Committee may, for the purpose of carrying out the provisions of this chapter, hold such hearings and act at such times and places as are deemed advisable. Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with applicable state or city law. The holding of hearings by the Advisory Committee or the appointment of a subcommittee or a hearing examiner to hold hearings pursuant to this paragraph, must be approved by a majority of the members present at a meeting at which a quorum is present.

(c) Without limiting the generality of the foregoing, the Executive Director or his deputies shall have the power and authority unless otherwise provided in applicable law, to administer oaths or take statements of witnesses with regard to the aformentioned hearings.

(d) The Advisory Committee shall have the power to create subcommittees; and the Commission with the advice of the Committee shall have the power to make such rules and regulations as are convenient or necessary to carry out the purposes of this chapter in the manner provided in the City Charter.

(e) All meetings of the Advisory Committee and its subcommittees shall be subject to the Open Meetings Law of the State of Louisiana. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-7. Report on hearings.

The Commission, after the completion of any hearing, shall make a report in writing to the Mayor and City Council setting forth the facts found and its recommendations or decision, as the case may be. At any hearing before the Commission or Committee a witness shall have the right to be advised by counsel present during such hearings. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-8. Meetings.

(a) The Advisory Committee shall meet for regular meetings at least once every two (2) months at such time

and place as shall be fixed by the Committee. Special meetings may be called by the Executive Director, by the Chairperson or, in his absence, by the Vice-Chairperson, and shall be called by the Executive Director on the written request of eight (8) or more members of the committee. All such requests and all notices of meetings shall state the purpose or purposes for which such special meeting is to be called and shall be filed with the Chairperson and served upon all members upon whom service can reasonably be made at least twenty-four (24) hours before the time of the special meeting.

(b) Such a request and call for a special meeting shall be read at the meeting and entered in the minutes, and no business shall be transacted except that stated in the request for such special meeting.

(c) The Executive Director shall prepare the agenda and give all notices required for each meeting. The Advisory Committee shall keep minutes of meetings and shall establish its own rules of order or adopt Robert's Rules of Order for the conduct of meetings. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40D-9. Assistance of mayor and executive branch.

The Commission or Committee may request and receive from the Mayor the use of such employees of his office as may be necessary for the proper conduct of business. The Department of Law shall designate a legal adviser for the Commission and Advisory Committee, who shall have

a voice but no vote in all matters. The services of all other departments of the City of New Orleans may be available to the Committee upon its request to the Mayor for such services. Information in the possession of any department, board, or agency of the City of New Orleans shall be furnished to the Commission or Committee upon request, and to the extent permitted by law, subject to any limitations upon its ability and capacity to furnish the information. Upon the refusal by any director or head of any department, board, or agency of the city to furnish any information which has been requested, the matter shall be referred to the Mayor, who shall determine promptly whether such information shall be furnished to the Commission and Committee; and the decision of the Mayor shall be final. The Department of Property Management is authorized to allocate adequate office space and to provide necessary facilities for the Commission, and shall provide a suitable meeting place for the Advisory Committee. (M.C.S., Ord. No. 14,910, § 1, 11-26-91; M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Sections 40C-10—40C-49. Reserved.

ARTICLE II. CITY POLICY AND PROCEDURES AGAINST DISCRIMINATION.

Section 40C-50. Policy and procedures.

In the City of New Orleans with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, age, physical condition, national origin and ancestry, many of them with disabilities, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants

than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, sex, creed, religion, age, national origin or ancestry, or physical condition or disability or sexual orientation. The Council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The New Orleans Human Relations Commission as created by Article I of this chapter is designated as an instrument of the city's power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry, or physical condition or disability whenever such discrimination is prohibited by provisions of this chapter or other city law; and said commission is hereby designated as the local Human Rights Commission for this city and is given such jurisdiction and power for such purposes as is conferred upon or authorized to a local Human Rights Commission under applicable state law. Except as otherwise provided in the City Charter, this Code, or applicable state law, the Commission is hereby authorized to enforce and administer any and all city ordinances prohibiting discrimination in public accommodations or in other areas, including but not limited to, the provisions of this chapter.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-51. Complaints; investigations.

The New Orleans Human Relations Commission shall receive, investigate and pass upon complaints and may initiate its own investigation of:

(a) Racial, religious and ethnic group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(b) Discrimination againsst any person, group of persons, organization or corporation, practiced by private persons, associations, or corporations, and, after consultation with the Mayor, by city officials or city agencies, Upon its own motion, the Commission may make, sign and file complaints alleging violations of any provision of this chapter or any other law prohibiting discrimination.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-52. Club membership list.

The Commission shall not require the production of names from a general membership list of any club that is a place of public accommodation. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-53. Discriminatory acts and practices prohibited.

(a) Any person claiming to be aggrieved by an unlawful discriminatory practice or other act prohibited by this chapter may, by himself or herself or through an attorney-at-large, make, sign and file with the Commission a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice or act complained of and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. The Commission through its Executive Director may, in like manner, make, sign and file such a complaint. In connection with the filing of such a complaint, the Commission

is authorized to take proof, issue subpoenas and administer oaths in the manner provided in all applicable administrative laws, regulations and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the Commission a verified complaint asking for assistance by conciliation or other remedial action.

(b) After the filing of any complaint, the Commission shall make prompt investigation in connection therewith. If the Commission shall determine after such investigation that probable cause does not exist for crediting the allegations of the complaint that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in a prohibited or unlawful discriminatory practice, the Commission shall issue and cause to be served on the complainant an order dismissing such allegation of said complaint as to such respondent. The complainant may, within thirty (30) days of such service, apply to the Council for consideration of such action of the Commission. Upon such application, the Council may review such action and determine whether there is probable cause to credit the allegations of the complaint and accordingly shall enter an order affirming, reversing or modifying the determination of the Commission or remanding the matter for further investigation and action, a copy of which order shall be served upon the complainant.

(c) If the Commission, after investigation, shall determine that there is probable cause to credit the allegations of the complaint, or if the Council after consideration, shall determine that there is such probable cause, the Commission shall immediately endeavor to eliminate such prohibited acts or unlawful discriminatory practice by pro-

ceeding in the following manner:

(1) If in the judgement of the Commission circumstances so warrant, it may endeavor to eliminate such prohibited or unlawful discriminatory practice by conference, conciliation and persuasion, resulting in a conciliation agreement. The terms of such conciliation agreement shall include provisions requiring the respondent to refrain from the Commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agree upon by the Commission and respondent, including a provision for the entry in court of a consent decree embodying the terms of the conciliation agreement.

(2) In case of failure to eliminate the unlawful discriminatory practice complained of, or in advance thereof as determined by the Commission, it shall cause to be issued and served in the name of the Commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint at a hearing before a hearing officer designated by the Executive Director, at a time and place to be fixed by the Executive Director, and specified in such notice. The place of any such hearing shall be the office of the Commission or such other place as may be designated in the notice. The case in support of the complaint shall be presented before the Commission by the Department of Law or another representative designated by the Executive Director.

Endeavors at conciliation by the Commission shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant shall have the power to make reasonable amendments of the complaint, and the repondent shall have like power to make reasonable amendments of his or her answer. The Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be recorded in an electronically stored video and/or audio format and may be transcribed at the expense of any person who desires a transcript. Any party may cause the hearing to be recorded by a certified court reporter at his or her own expense.

(3) If, upon all the evidence at the hearing, the Commission, or such hearing officer as may have been designated, shall find that a respondent has engaged in any unlawful discriminatory practice prohibited in this Code, the Commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) restoration to membership in any respondent organization, admission to or participation in a program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating applications for membership in a club

that is not distinctly private without discrimination based on race, creed, religion, color, national origin, ancestry, sex, physical condition, sexual orientation or disability, and including a requirement for report of the manner of compliance. If, upon all the evidence, the Commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the Commission shall state its finding of fact and shall issue and cause to be served on the complainant an order dismissing the complaint as to such respondent.

(d) Any complaint filed pursuant to this section must be so filed within one (1) year after the alleged act of discrimination.

(e) Whenever a complaint has been filed against any carnival krewe, parading carnival organization or other organization organized or existing for the primary or dominant purpose of observing or participating in the carnival season, the respondent may submit an affidavit of its captain or other officer of commensurate rank, attesting or affirming that the respondent has no written or unwritten provision in its charter, by-laws, rules, regulations or policies which calls for the refusal, withholding or denying of membership, or any of the services, accommodations, advantages, facilities or privileges offered by the respondent to members or others, because of race, color, creed, religion, national origin, sexual orientation or ancestry, or which unreasonable calls for such discrimination on the basis of age, sex, physical condition or disability and that it and its members will, except as otherwise authorized by Section 40C-111, treat all proposals for membership in a non-discriminatory manner in accordance with the procedures

contained in the krewe's by-laws and regulations. Upon receipt of such writing, the Commission shall issue and cause to be served on the complainant an order dismissing such complaint and no further proceeding shall be had by way of hearing or otherwise before the Director or Commission or by appeal to the Council.

(f) At any time after the filing of a complaint alleging an unlawful discriminatory practice under this chapter, if the Commission determines that the respondent is doing or procuring to be done any act tending or render ineffectual any order the Commission has entered or may thereafter enter in such proceeding, the Commission may authorize the Department of Law to apply in the name of the city and Commission to any court of competent jurisdiction and proper venue, for an order requiring the respondents or any of them to show cause why they should not be enjoined from vitiating or violating the restraining order and shall be served in the manner provided therein.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15-917, § 1, 5-7-92.)

Section 40C-54. Judicial review and enforcement.

Subject to applicable state law, any complainant, respondent or other person aggrieved by any infringement of an order of the Commission may obtain an order of court for its enforcement. Such proceeding shall be brought in a court of proper venue and competent jurisdiction.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 7, 5-7-92.)

Section 40C-55. Penal provision for obstruction.

Any person, employer, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the Commission or any of its agents or representatives in the performance of duty under this chapter, or shall willfully violate an order of the Commission or any of its members or representatives in the Performance of duty under this chapter, shall be guilty of a misdemeanor and shall be punished by imprisonment for not more than five (5) months, or by a fine of not more than three hundred dollars ($300,00), or by both such imprisonment and such fine; provided that procedure for the review of the order shall not be deemed to be such willful conduct, (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-56. Construction.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal, supersede, or impair any of the provisions of any civil rights law or any other law of this city or state relating to discrimination because of race, creed, religion, color, national origin or ancestry, physical condition or disability; but as to acts declared unlawful by this chapter, the procedure provided in this article shall, while pending, be exclusive of all other civil procedures created by city law (but not exclusive of misdemeanor criminal law procedures or procedures under state or federal law); and the final determination therein shall exclude any other civil action, or remedy created by city law, based on the same grievance of the person concerned. If such person institutes any such

action or seeks any such remedy based on such grievance without first resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure set forth herein.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-57. Criminal penalties, generally.

(a) Unless it is expressly provided otherwise elsewhere in a particular section of this chapter, any person who does anything prohibited or fails to do anything required by this chapter shall be guilty of a misdemeanor and upon conviction thereof, shall be sentenced to a term of imprisonment not to exceed five (5) months, or to a fine not to exceed three hundred dollars ($300.00), or to both such imprisonment and such fine.

(b) Unless required to do so by applicable law or by the Court, the City Attorney shall not prosecute an offense this under section during the pendency under Article II of this chapter of civil proceedings concerning the same complainant and respondent and the same grievance before the Human Relations Commission.(M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Sections 40C-58—40C-100. Reserved.

ARTICLE III. DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND CLUBS.

SECTION 40C-101. Discrimination in public.

Accommodations; definition. For the purposes of

this article, the following words and phrases shall have the meanings hereinafter assigned unless a particular context clearly indicates otherwise:

Benevolent or fraternal lodge. The term "benevolent or fraternal lodge" shall mean a society or voluntary association organized and carried on for the mutual aid and benefit of its members, not for profit, which ordinarily has a lodge system a ritualistic form of work, and a representative government, and an emphasis on the common interests and bonds of friendship among its members. The term shall not include any entity or associated club organized or existing for the dominant purpose of participating in or observing the Carnival Season.

Commission. The term "Commission," unless a different meaning clearly appears from the context, means the New Orleans Human Relations Commission, the creation of which is authorized by this chapter.

Director. For the purposes of this article, "Director" shall mean the Executive Director of the New Orleans Human Relations Commission, if such a body has been established, or in the absence thereof any officer or employee of the city designated by law to implement the provisions of this article, or, if no applicable law makes such a designation, designated by the Mayor in a writing filed with the Clerk of Council.

Disability. The term "disability" refers to the status or defining characteristic of a "disabled" or "handicapped" person; the terms "disabled person" or "handicapped person" mean any person who has or had a physical or mental impairment that substantially limits one or more major life activities, and who has a record of such an impairment or who is perceived to have such an impairment.

Discrimination; to discriminate. Any difference in the treatment of a person, including exclusion or segregation, because of race, color, creed, religion, sex, sexual orientation, national origin, ancestry, age, physical condition, or disability.

Has a record of such an impairment. The term "has a record of such an impairment" means has a history of, or has been classified as having a mental or physical impairment that substantially limits one or more major life activities.

Major life activities. The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Person: An association, partnership, corporation, or other legal entity or a natural person. As applied to a partnership or other entity, "person" includes its members, and as applied to a corporation, "person" included its officers.

Public accommodation, resort, or amusment includes:

(1) Any place or means of transportation which is open to, accepts or solicits the patronage of the general public or offers goods or services to the general public, including all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accomodation of those seeking health, recreation or rest; or restaurants, or eating houses, or any place where food is sold for consumption on the premises; takeout restaurants;

buffets, saloons, barrooms, or any store, park or enclosure where alcoholic beverages are sold; ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption; retail stores and establishments dealing with goods or services of any kind; clinics, hospitals, bathhouses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, casinos, betting parlors, bingo or other charitable gaming halls, skating rinks, amusement and recreation parks, video arcades, amusement parlors, trailer camps, resort camps, fairs, bowling alleys golf courses, gymnasiums, marinas and public boating facilities, shooting galleries, billiard and pool parlors; massage establishments and health clubs; garages, taxicabs, limousines and all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour services, agencies, or bureaus; public halls and public elevators of buildings and structures occupied by two (2) or more tenants, or by the owners and one (1) or more tenants.

(2) Any institution, club, or place of accommodation which:

a. has more than seventy-five (75) members.

b. either:

1. regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly; either from or on behalf of nonmembers or members for or in the direct or indirect furtherance of trade or business or from or on behalf of any persons who claim such payment as a business expense for tax purposes, or,

2. has, within the preceding calendar year, received a permit pursuant to Section 12A-20 of this Code to parade during the defined carnival parade season as set forth, in Section 12A-4 of this Code while having within its charter, by-laws, rules regulations or written or unwritten policies any provision which calls for the refusal, withholding or denying of membership or of any of the services, accommodations, advantages, facilities or privileges offered by the institution, club, or place of accommodation to members or others because of race, color, creed, religion, national origin, sexual orientation, or ancestry, or which unreasonably calls for such discrimination because of physicial condition, or disability, and

c. which either:

1. provides regular meal service, or

2. uses for its activities, on a recurring basis, the public streets, ways or places or publicly owned or operated facilities under authority of a

permit, license, franchise or priviledge granted by a public body, under circumstances such that, as a result of said activities in or on publicly owned or operated property, expenses are incurred by a public body which are not wholly recovered in payments to the public body by the institution, club, or place of accommodation. The rental of the Municipal Auditorium by a nonprofit corporation, at the "full-price" rates as established by the Chief Administrative Officer, is hereby declared to be a situation in which the expenses incurred by the city are wholly recovered by payment as to the city by the nonprofit corporation. It shall by the duty of the Chief Administrative Officer to ensure that the payments for rental of the Municipal Auditorium by a nonprofit corporation for events which are not open to the public at-large are sufficient to wholly recover all expenses incurred by the City of New Orleans.

(3) "Public accommodation," "resort" or "amusement" is expressly deemed not to include, provided the accommodation's facilities, services, advantages and privileges are restricted to members and their guests:

a. Any bona fide private club, which:

1. does not have more than seventy-five (75) members;
2. which neither:

(a) regularly receives payments for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly, either from or on behalf of non-members or members for or in the direct or indirect furtherance of trade or business or from any persons who claim such payment as a business expense for tax purposes, nor

(b) has, within the preceding calendar year, received a permit pursuant to Section 12A-20 of this Code to parade during the Carnival Parade Season as set forth in Section 12A-4 of the Code; or

3. which neither:

(a) provides regular meal service, nor

(b) uses for its activities, on a recurring basis, the public streets, ways or places or publicly-owned or operated facilities in the manner and under the circumstances hereinabove described.

b. Any bona fide benevolent or fraternal lodge or religious or political organization, or any organization formed for the predominant purpose of advocacy of a cause or viewpoint which by the nature of its purpose excludes from its membership those to whom the advocated cause or viewpoint is inimical.

Regular meal service. The term, "regular meal service" shall mean the availability of meals on a predictable basis as to time and place and on premises owned or controlled by a public accommodation, resort, or amusement, as defined herein, where such meals are prepared and/or served by employees of said public accommodation or its lessee, contractors, licensee or agent, for consumption on said premises by members and/or guests.

"Regular meal service" shall not include meals provided as hospitality by a member in a private home or public restaurant, nor the sale of commercially-packaged snack items, nor infrequent meals such as banquets or ceremonial breakfasts held to celebrate special occasions.

Sexual orientation. The term "sexual orientation" is defined as heterosexuality, homosexuality or bisexuality for purposes of this chapter.(M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 2, 5-7-92; M.C.S., Ord. No. 15,199, § 1, 5-21-92.)

Section 40C-102. Unlawful practices.

(a) It shall be an unlawful discriminatory practice and a misdemeanor for any public accommodation, resort, or amusement, as defined in Section 40C-101 or for any person who is the owner, lessee, proprietor, manager, superintendent, employee, officer or agent thereof:

(1) To discriminate against any person, either directly or indirectly, by refusing, withholding, or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by the

public accommodation, resort or amusement, by placing or attempting to place any person in a separate class of customers, patrons, members, guests or usere or in a separate section or area of the premises or facilities of the public accommodation, resort or amusement because of race, color, creed, religion, national origin, ancestry, or unreasonably because of age, sex, sexual orientation, physical condition or disability.

(2) To publish, circulate, issue, display, post or mail either directly or indirectly any written or printed communication, notice or advertisement to the effect that any of the services, accommodations, advantages, facilities or privileges of any public accommodation, resort or amusement will be refused, withheld, or denied to any person on account of race, color, creed, religion, national origin, ancestry, or unreasonably on account of sex, sexual orientation, age, physical condition or disability, or that the patronage of any person of a particular race, color, creed, religion, sex, sexual orientation, national origin ancestry, age, physical condition or disability, is unwelcome, objectionable or not acceptable, desired or solicited, or that any person is required or requested to use a separate section or area of the premises or facilities of the public accommodations, resort or amusement, because of race, color, creed, religion, national origin, ancestry, or unreasonably because of sex, sexual orientation, age, physical condition or disability.

(3) to aid, abet, incite, counsel or coerce the doing of

any act declared herein to be unlawful or to prevent any person from complying with this article or any rule, regulation or order issued pursuant there to.

(b) The provisions of this section shall not prohibit to the placement of persons in a separate restroom, bath, locker room, shower, physical or medical examination or treatment facility, dressing area, or dormitory or sleeping room used by more than one (1) party of persons at a time, if such placement is reasonable and based on the person's sex or sexual orientation. The provisions of this section shall not apply, with respect to sex, sexual orientation, physical condition, or disability, to places of public accommodation, resort or amusement where the Council or the Commission grants an exemption based on bona fide considerations of public policy. Any place of accommodation which is required as a result of this section to construct or reconstruct a locker room, shower, or other facilities for the use of members of a particular sex or similar group or for the use of the mobility impaired shall be allowed until the first anniversary of the effective date of [Ordinance Number 14,984,] the ordinance by which this article is adopted, to complete such work, and prior to such date shall not be found to be in violation of the provisions of this section which apply to such facilities with regard to discrimination on account of sex or a mobility-impairment disability. The Director, for good cause shown, may grant an extension not to exceed an additional ninety (90) days after the date allowed such place of accommodation to complete such work.

(c) It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section

applies to retaliate or discriminate against any person because such person has opposed any practices forbidden under this chapter or such person filed a complaint, testified or assisted in any proceeding under this chapter.

(d) It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to Article II of this chapter to violate the terms of this chapter to violate the terms of such agreement.

(e) Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization, operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religious or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

(f) No act or practice shall be construed as an unlawful discriminatory practice under this chapter if that act or practice is expressly authorized by valid and presemptive state or federal law. Nothing in this chapter shall be construed as requiring or as authorizing a public accommodation to require a person with a particular physical condition or disability to accept any special facilities or treatment offered as a special accommodation for persons with such a condition or disability if such person declines to accept such special accommodation. It shall be an unlawful discriminatory practice for any person to refuse, withhold, or deny any service, accommodation

because the person with the particular physical condition or disability had declined to accept such a special accommodation; provided, however, that a person with a mobility impairment that requires the use of a wheelchair or similar device may be required to accept a special accommodation if refusal to do so would necessarily result in a violation of fire code or similar public safety regulations. (M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 3, 5-7-92.)

Section 40C-103. Distinctly private entities.

(a) The Director shall maintain a registry of institutions, clubs or places of accommodation certified by him or her to be distinctly private in character. The provisions of Section 40C-102 shall not apply to any institution, club or accommodation included in the registry for so long as it is so included. Any certification that a club or institution is distinctly private in character shall be valid for a period of three (3) years from the date of the initial certification, but may be renewed upon application of the registrant for successive additional periods of three (3) years.

(b) The Director, upon application of any institution, club or accommodation shall certify an applicant for inclusion in the registry if the applicant proves, by a preponderance of the evidence, that it is distinctly private in character. A club or institution is distinctly private in character if either:

(1)a. Its services, accommodations, advantages, facilities, or privileges are not offered or available to the public or to a wide sector of the public exclusive of a class or classes

discrimination against whom is prohibited by this article;

b. it is not an agent of the state or its creatures, agencies or subdivisions, and its activities do not constitute state action;

c. it does not advertise for or engage in general solicitation to attract potential customers, patrons, or members;

d. it does not fulfill a vital community role affected with public interest;

e. its activities are not subsidized directly or indirectly by public funds, nor does it otherwise receive governmental support;

f. it does not exist or operate for commercial or business purposes;

g. it generally denies its services, accommodations, advantages, and privileges and participation in its activities, meetings, and social functions to all but members and their guests;

h. its membership is of moderate size, and it is not connected with a larger institution, club or accommodation that is a public accommodation;

i. its organizers had the intention of constituting a private institution, club, or accommodation;

j. its organizational structure has not been altered since passage of the Civil Rights Act of 1964 in an attempt to avoid the applicabili-

ty of that act, or since the date of the effectiveness of this chapter, in an effort to avoid the applicability of this article;

k. its members have an nexus of common interest;

l. its membership policies include an element of exclusiveness based on one (1) or more criteria other than membership in a class against whom discrimination is prohibited by this article; and

m. it does not offer or constitute facilities, sponsor activities, or create an environment where business deals are often made and personal contacts valuable for business purposes, employment, and professional advancement are formed; or

(2) its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 not be applied against it.

(c) (1) An application to be certified for inclusion in the registry shall be in writing on a form prepared by the Director and shall include all information reasonably determined by the Director to be necessary or useful to consideration of the application.

(2) Each application shall be signed by a duly authorized officer or agent of the applicant who shall attest by oath or affirmation to the truth of its contents.

(d) Upon receipt of an application, the Director shall assign it a date and time for public hearings which shall be not sooner than four (4) weeks and not later than six (6) weeks from the date of receipt of the application. Notice of the application and the hearing, in a standard form which shall be prescribed by the Director, shall be published in the Official Journal, by the applicant and at its expense, at least three (3) times, so that the first publication shall be not more than twenty-eight (28) and not less than twenty-one (21) days and so that the last publication shall be not more than seven (7) and not less than two (2) days prior to the hearing. Any interested person may appear at the hearing to support or oppose the application, subject to such reasonable regulations and time limits as the Director, or his designee as presiding officer, may prescribe. The hearing shall be conducted in accordance with the provisions of the Administrative Procedures Act with respect to the rules of evidence.

(e) Within seven (7) days of the conclusion of the hearing, the Director shall notify the applicant and any interested person who has requested such notice of his or her determination to grant or deny certification for inclusion in the registry. The decision of the Director shall be in writing, shall state the reasons for his or her determination, and shall become effective as a certification seven (7) days after it is assigned by the Director.

(f) On his or her own motion, or upon the written

complaint of any interested person, the Director may initiate proceedings for the removal of any institution, club or accommodation from the registry. The motion or complaint by which removal proceedings are commenced shall be in a verified writing and shall set forth facts sufficient to show that the respondent institution, club or accommodation is not distinctly private in character. The motion or complaint shall be signed by the complainant or a duly-authorized agent of the complainant who shall attest by oath or affirmation to the truth of its contents.

(g) Upon the receipt of filing in the office of the Director of such a motion or complaint, the Director shall assign it a date and time for public hearings which shall be not sooner than four (4) weeks and not later than six (6) weeks from the date of receipt of the complaint. Notice of the complaint and the hearing, in a standard form which shall be prescribed by the Director, shall be published in the Official Journal, by the complainant and at its expense, at least three (3) times, so that the first publication shall be not more than twenty-eight (28) and not less than twenty-one (21) days and so that the last publication shall be not more than seven (7) and not less than two (2) days prior to the hearing. Any interested person may appear at the hearing to support or oppose the complaint, subject to such reasonable regulations and time limits as the Director, or his designee as presiding officer, may prescribe. The hearing shall be conducted in accordance with the provisions of Administrative Procedures Act with respect to the rules of evidence. Within seven (7) days of the conclusion of the hearing, the Director shall notify the complainant, and any interested person who has requested such notice, of his or her determination to grant or deny continued certification

for inclusion in the registry. The decision of the Director shall be in writing, shall state the reasons for his or her determination, and shall become effective seven (7) days after it is signed by the Director. If a decision to deny continued certification becomes effective, the respondent shall be removed from the registry immediately.

(h) An institution, club or accommodation may at any time apply or reapply to be certified for inclusion in the registry notwithstanding the fact that it may have been denied certification or been removed from the registry in the past. A motion or complaint seeking removal of a club or institution from the registry shall be denied without a hearing by the Director if a motion or complaint initiated by the same person and setting forth the same or substantially similar facts has been denied within the past six (6) months. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-104. Reserved.[2]

Section 40C-105. Exclusion based on disability.

Nothing in this article shall be construed to prohibit a parading carnival krewe or other parading organization from excluding a person with a disability from riding on a float in a parade; provided, that an organization not exempt under the provisions of Section 40C-101(b) may exclude such a person only if the Director certifies in writing, after consultation with the officers of the organization,

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[2] Section 1(1) of M.C.S., Ord. No. 15,058, adopted Feb. 6, 1992, repealed § 40C-104 in its entirety. Formerly, § 40C-104 pertained to registry of nondiscriminatory entities and derived from § 1, of M.C.S., Ord. No. 14,984, adopted Dec. 19, 1991.

with the excluded person, and with the Director of Health, that permitting the person with a disability so to ride would create a public safety or health hazard or would cause an unreasonable burden of expense to the parading krewe or other organization. Any legitimate increase in the cost of procuring insurance may be considered when determining the reasonableness of proposed discrimination. This section shall not authorize the exclusion of any person from the other benefits of membership or participation in such a krewe or organization not exempt under the provision of Section 40C-101(b), on the basis of disability. (M.C.S., Ord. No. 14,984, § 1, 12-19-91; M.C.S., Ord. No. 15,197, § 4, 5-7-92.)

Section 40C-106. Operation of Article III with respect to other laws.

(a) The provisions of this article, for so long as the same remain in effect, shall supersede with respect to discrimination in "public accommodations" as defined in this article, any and all conflicting or incompatible provisions or applications of provisions of Article IV. No respondent or defendant shall be required to defend against or shall be held accountable or guilty of both a charge of discrimination in public accommodations under this article and a charge of discrimination in public accommodations under Article IV if the charge arises out of the same alleged discriminatory practice or acts, if being the intent of this chapter that any discrimination in public accomodation which is unlawful under both Article III and Article IV shall be treated as a violation of this article such time as [a complaint has been filed pursuant to this article.]

(b) The provisions of Subsections (e), (f) and (g) of Section 40(c)-122 of Article IV shall apply to this article.

(c) No complaint shall be filed in Municipal Court regarding discriminatory acts or practices which are prohibited by Article III under [until] such time as a complaint has been filed pursuant to the requirement of Article III and a final disposition of the matter has been made by the Commission. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-107. Effective date of enforcement; Blue Ribbon Committee on Carnival.

(a) During the first year following the effective date of [Ordinance Number 14,984,] the ordinance by which this article is adopted, no carnival krewe or parading carnival organization or other organization organized or existing on the effective date of this article for the primary or dominant purpose of observing or participating in the carnival season and no club or institution that falls within the scope of Section 40C-101(b)(2) shall, under this article, be subject to any enforcement action, penalty, prosecution, or liability or denied any permit, right or privilege which it has hitherto enjoyed.

(b) As soon as possible after the adoption of this article, the Mayor shall appoint a citizen's advisory committee, to be known as the Blue Ribbon Committee on Carnival. The Committee shall consist of two (2) members designated by the Mayor, one (1) member designated by each of the seven (7) Councilmembers and nine (9) members designated by the Mayor's Mardi Gras Coordinating Committee.

(c) By the three hundred thirtieth day following the effective date of [Ordinance Number 14,984,] the ordinance by which the article is adopted, the Blue Ribbon Committee on Carnival shall recommend in writing to the Mayor and the Council any amendments to this chapter which they believe appropriate to promote the interests of the city in preserving the benefits of its traditional carnival and promoting equal rights and opportunities for all. (M.C.S., Ord. No. 14,984, § 1, 12-19-91.)

Section 40C-108. Reserved.

Section 40C-109. Affidavit required; parades during carnival season.

Each applicant for any permit to parade during the carnival season under Chapter 12A of this Code shall, at the time of applying for the permit, file with the Department of Police an affidavit of its captain or other officer of commensurate rank, attesting that the applicant entity or group has no written or unwritten provision in its charter, by-laws, rules, regulations or policies which calls for the refusal, withholding or denying of membership, or any of the services, accommodations, advantages, facilities or privilege offered by the respondent to members or others, because of race, color, creed, religion, national origin, sexual orientation or ancestry, or which unreasonably calls for such discrimination on the basis of age, sex, physical condition or disability, and that the applicant and its members will, except as otherwise authorized by Section 40C-111, treat all proposals for membership in a nondiscriminatory manner in accordance with the procedures contained in the krewe's by-laws and regulations. The filing of such an af-

fidavit shall be a prerequisite to the granting of the permit. (M.C.S., Ord. No. 15,197, § 5, 5-7-92.)

Section 40C-110. Specific enforcement provisions for Section 40C-101, Institutions.

(a) The violation of this article by carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as a "public accommodation" under this article shall not constitute a misdemeanor and shall not be subject to prosecution or punishment in the Municipal Court, unless the violation arises from the breach of a final, definitive and enforceable order of the Commission or of an order embodying a conciliation agreement or unless the violation is the willful resitance, prevention, impedance, or interference with the Commission or any of its agents or representatives in the perfomance of its duty under this chapter. Notwithstanding any other provisions of this chapter, to the contrary, any violation of this article by carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as "public accommodation" under this article, or by the officers or agents of any body in their capacity as such, which does constitute a misdemeanor, shall be punishable only by a mandatory fine of not less than one hundred

dollars ($100.00) and not more than three hundred dollars ($300.00) and shall not be punishable by imprisonment.

(b) Neither the city nor the Commission shall be obligated to initiate or intervene in any proceedings in any Court for the purpose of enforcing this article or a final order of the Commission against any carnival krewes, parading carnival organizations, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season and clubs or institutions which fall within the scope of Section 40C-101 and which would not otherwise than under the provisions thereof be considered as a "public accommodation" under this article, unless the violation arises from the breach of an order embodying a conciliation agreement or unless the violation is the willful resistance, prevention, impedance or interference with the Commission or any of its agents or representatives in the performance of its duty under this chapter. Nothing in this section shall preclude any nonmunicipal party in interest from initiating such proceedings.

(c) Whenever a Court of competent jurisdiction issues an order of the Court for the enforcement of this article or of an order of the Commission directed to a carnival krewe, parading carnival organization, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season, or clubs or institutions which fall within the scope of Section 40C-101, then during any period when said order is effective, said organization shall not be granted a permit for a carnival parade during the carnival season, as required by Section 12A-20 of this Code, unless a sworn affidavit is

submitted with the permit application by the captain, president or officer of commensurate rank within the organization stating that the court order has been complied with and will continue to be complied with.

(d) Whenever a Court of competent jurisdiction issues an order of court for the enforcement of this article or of an order of the Commission directed to a carnival krewe, parading carnival organization, other organizations organized or existing for the primary or dominant purpose of observing or participating in the carnival season, or clubs or institutions which fall within the scope of Section 40C-101, said organization shall not be granted an alcoholic beverage permit unless a sworn affidavit is submitted with the permit application by the captain, president or officer of commensurate rank within the organization stating that the court order has been complied with and will continue to be complied with. Subsection (d) shall not apply to an alcoholic beverage permit for a business which either holds or is applying for an occupational license issued by the Department of Finance, nor to temporary alcoholic beverage permits.

(e) The submission of a sworn affidavit pursuant to subsections (c) or (d) which contains false statements, in addition to being subject to any other penalty provisions for the making of false affidavits, shall be considered a misdemeanor punishable by a mandatory fine of not less than one hundred dollars ($100.00) and not more than three hundred dollars ($300.00). (M.C.S., Ord. No. 15,058, § 1(2), 2-6-92.)

Section 40C-111. Preservation of traditional roles in carnival parading organization.

(a) The Council finds that:

(1) Carnival organizations have traditionally engaged in parades, procession, tableaux, and other activities that have, in large part, a dramatic theatrical character, involving elaborate costumed role-playing by participants who frequently imitate or portray the behavior of ancient or medieval court life;

(2) Although such traditional carnival activities most often involve participation by both women and men, the participants traditionally engage in courtly roles defined and differentiated according to the sex of the participants, as was the case in ancient and medieval court life;

(3) The preservation of the traditional mimicry of court life is worthy of preservation as a significant aspect of the common cultural heritage of all the people of New Orleans;

(4) Most women and men in the city who wish to find ways of participating in carnival organizations can do so, either as members or consorts of members in the traditional krewes that restrict membership to one or the other sex, or in one of the less traditional organizations which admit both sexes to membership; therefore, the Council finds that the traditional organizations by restricting their member-

ship to one sex do not significantly impair the ability of women or men to make business contacts, secure professional advancement, or otherwise participate in trade, commerce, the professions, or public life in general.

(b) Nothing in this chapter shall prohibit any carnival krewe, parading carnival organization, or other organization organized or existing for the primary or dominant purpose of observing or participating in the carnival season from restricting its membership or any class of membership to classes based on sex. (M.C.S., Ord. No. 15,197, § 6, 5-7-92.)

Sections 40C-119. Reserved.

ARTICLE IV. DISCRIMINATION IN PUBLIC ACCOMODATIONS, EMPLOYMENT, AND REAL ESTATE AND HOUSING.

Section 40C-120. Definitions-Discrimination unlawful practices.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) *Commercial housing.* Housing accommodations held or offered for sale or rent by a real estate broker or agent, or by any person pursuant to authorization of the owner, by the owner or by a legal representative of the owner.

(2) *Discrimination.* Any difference in treatment in hiring, referring for hire, promoting, training, in membership in employee or labor organizations, selling, leasing, rental or financing of housing, or in rendering services, accommodations, advantages, facilities, or privileges offered by a public facility or place of public accommodation on the basis of race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation or handicap.

(3) *Handicap.* An impairment which substantially limits one or more life activities or:

a. a record of such impairment; or

b. a perception of such an impairment.

(4) *Life activities.* Functions such as caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(5) *Owner.* Shall include curator, administrator, tutor, executor, lessee, sublessee, signee, manager, agent or any other person having the right or ownership of possession or the authority to sell, rent or lease any commercial housing, including the City of New Orleans.

(6) *Person.* An association, partnership, corporation and governmental entity, as well as a natural person. As applied to partnerships or other associations, "person" includes their members and as ap-

plied to corporations, "person" includes their officers.

(7) *Public accommodation.* Any place or means of transportation which is open to, accepts or solicits the patronage of members of the general public, but does not include any place which is a bona fide private club where the accommodations, facilities and services are restricted to the members of such club and their guest.

(8) *Public facility.* Any facility owned, operated, or managed by any governmental entity.

(9) *Sexual Orientation.* Homosexuality, heterosexuality or bisexuality. (M.C.S., Ord. No. 14,976, § 1, 12-12-91.)

Section 40C-121. Same—Unlawful practices.

It is unlawful for any person:

(1) To discriminate against any person, either directly or indirectly, by refusing, withholding or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by a public facility or place of public accommodation, by setting different rates, charges, identification procedures or requirements therefor, or by placing or attempting to place any person in a separate section or area of the premises or facilities of the public accommodation, resort or amusement on the basis of race, color, gender, marital status, age, creed,

religion, national origin, ancestry, sexual orientation, or handicap; provided that nothing contained in this section shall prohibit the provision of separate bathroom, restroom shower or similar facilities for males and females.

(2) To discriminate by failing or refusing to hire or by discharging an individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect an individual status as an employee on the basis of that individual's race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation, or handicap.

(3) To discriminate in the selling, renting or leasing of commercial housing or real estate on the basis of race, color, gender, marital status, age, creed, religion, national origin, ancestry, sexual orientation or handicap.

(4) to publish, circulate, display, post or mail either directly or indirectly, any written or printed communication, notice or advertisement which evidences an intent to violate directly or indirectly any of the provisions of this section.

(5) To aid, abet, incite, counsel or coerce the doing of any act therein declared to be unlawful or to prevent

any person from complying with this section or any rule, regulation or order issued pursuant to this section. (M.C.S. Ord. No. 14,976, § 1, 12-12-91.)

Section 40C-122. Exclusions from Sections 40C-120 and 40C-121.

Nothing in Sections 40C-120 and 40C-121 of this article shall be construed to:

(1) Restrict an employer's right to require that an employee meet bona fide job-related qualifications of employment.

(2) Authorize or require employers to establish affirmative action quotas based on sexual orientation.

(3) To apply to any business, trade or occupation employing fewer than eight (8) employees, or to any unit in a residential structure containing not more than four (4) units, if the owner maintains and occupies one of such units as his residence.

(4) To apply to any religious corporation, religious entity, religious association, or religious organization, or any non-profit corporation, or organization or group, including charitable organizations, with respect to the employment of individuals, or with respect to the employment policies, practices and procedures established by any such corporation, entity, association, or society.

(5) Make lawful any act that violates the Louisiana Criminal Code.

(6) The provisions of this article shall not be read to limit or affect in any way rights and privileges existing under state or federal law and the City of New Orleans explicitly disavows its rights to any period of exclusive jurisdiction over filed charges which may exist under state or federal law, including but not limited to U.S.C., Section 2000(e), et seq.

(7) Notwithstanding anything herein expressed to the contrary, nothing in this article shall be deemed or construed to authorize or encourage the promotion of sexual orientation in any public or private educational institution or school, or to require the teaching in any public or private educational institutional of sexual orientation. It is the intent of this article to assure the rights of the citizens of this city and all persons, particularly with respect to the securing of housing and employment; this article does not have for its purpose the establishment of any public policy regarding the acceptability or nonacceptability of sexual practice. (M.C.S., Ord. No. 14,976, § 1,-12-12-91.)

Section 40C-123. Enforcement and penalties.

Any violations of Sections 40C-120 and 40C-121, shall prior to the initiation of a prosecution in Municipal Court, be reported and processed in the manner specified within Chapter 40C. In the event that Chapter 40C has no enforcement provisions, or they are ruled unconstitutional, then any violators of Sections 40C-120 and 40C-121 shall be punishable in the same manner as specified in the

Municipal Criminal Code, and more particularly by Section 42-1 through 42-25, inclusive, but in no event shall the minimum penalty for any violation of Sections 40C-120 and 40C-121 be less than that specified in Section 42-5.1 of the Municipal Criminal Code. (M.C.S., Ord. No. 14, 976, § 1, 12-12-91.)